

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-220805

DATE: January 15, 1986

MATTER OF: Spectrum Communications

DIGEST:

1. Protest that bid was improperly rejected is denied where bid did not offer item required by solicitation specifications.
2. Protest that specification is restrictive filed after bid opening is dismissed as untimely.
3. Protest that awardee's bid should have been rejected as nonresponsive because awardee offered equipment which failed to meet certain solicitation requirements is denied where awardee's specification sheet and descriptive data establish that the equipment offered met the solicitation requirements.
4. Since agency determinations of price reasonableness are matters of administrative discretion, such a determination will not be questioned unless it is unreasonable or there is a showing of fraud or bad faith on the part of contracting officials.
5. Where awardee entered bid price for every item on the bid schedule and offered to perform as required under the solicitation, its failure to enter a total price in a particular section of its bid was properly considered a minor informality and waived.

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Spectrum Communications (Spectrum) protests the award of an indefinite quantity-type contract for modems to Terminal Networks Leasing Corp. (Terminal) under invitation for bids (IFB) No. DE-FB01-85-MA32930 issued by the Department of Energy (DOE). A modem converts computer digital signals into sound waves so that the signals may be transmitted along telephone lines.

We deny the protest in part and dismiss it in part.

Bidders were required to submit prices on a purchase and a lease with option to purchase basis. Three of the four firms that submitted bids in response to the IFB, including Spectrum, were rejected. Award for the lease with option to purchase was made to Terminal in the amount of \$80,580 for the minimum quantity of modems estimated in the IFB.

DOE rejected Spectrum's bid as nonresponsive because it failed to meet a mandatory solicitation requirement that certain modems have built-in dial pads.

Spectrum indicates that it in fact did not offer modems with built-in dial pads but alleges that its bid improperly was rejected because the dial pad feature is unnecessary. Spectrum maintains that a telephone attached to the modem would perform the same function as a dial pad. Spectrum also alleges that the requirement for modems with built-in dial pads is restrictive because only one company manufactures such modems.

To be responsive, a bid submitted must represent an unequivocal offer to perform the exact thing called for in the solicitation such that the acceptance of the bid will bind the contractor in accordance with the solicitation's material terms and conditions. Jarrett S. Blankenship Co., B-213294.2, Apr. 2, 1984, 84-1 C.P.D. ¶ 370. Thus, a bid must be rejected if it indicates that the product offered will not comply with the specifications. Validyne Engineering Sales Corp., B-218369, Apr. 3, 1985, 85-1 C.P.D. ¶ 387; Jarrett S. Blankenship Co., B-213294.2, supra. Here, Spectrum's bid was properly rejected because the firm did not offer modems with the dial pad feature as required by the specifications. Validyne Engineering Sales

Corp., B-218369; supra; Environmental Tectonics Corporation, B-213482, Mar. 20, 1984, 84-1 C.P.D. ¶ 336.

Spectrum's protest that the dial pad requirement is restrictive is untimely. Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1985), a protest which is based upon alleged solicitation improprieties apparent on the face of the solicitation, as here, must be filed prior to bid opening. Bid opening occurred on August 21, 1985. Therefore, Spectrum's protest concerning this issue filed on October 15, 1985 (almost 2 months after bid opening and after Spectrum learned of award to another firm), is untimely and will not be considered on the merits. Validyne Engineering Sales Corp., B-218369, supra.

Spectrum also alleges that the AT&T stand alone type modems, model numbers 2096C and 2048C, offered by Terminal in its bidding schedule do not meet certain solicitation requirements. Specifically, Spectrum contends that these modems are incompatible with other modems Terminal bid and do not meet the solicitation requirement that stand alone modems include modem housings. Spectrum maintains that Terminal's contract will have to be modified to correct these deficiencies.

DOE disagrees with the protester that Terminal's bid, when read in its entirety, offered the above-referenced models. DOE points out that in attachment "C" to its bid, Terminal states that it will provide AT&T stand alone type modems, model number 2096 with chassis and model number 2048 with chassis. DOE explains that attachment "C" required bidders to further describe the equipment offered in the bidding schedule. Therefore, the agency believes that the only reasonable interpretation of Terminal's bid is that the letter "C" following the models numbers, as explained by reference to attachment "C", refers to a chassis or modem housing. DOE states that the AT&T modems, model number 2096 with chassis and model number 2048 with chassis, satisfy the solicitation requirements for modem housing and are compatible.

We agree with DOE that the only reasonable interpretation of Terminal's bid is that the firm intends to furnish the AT&T modems model number 2096 with chassis and model number 2048 with chassis, so that acceptance of the

bid legally would bind Terminal to supply these units. Further, the descriptive data submitted with Terminal's bid states that these modems will "be housed with a chassis." Spectrum does not dispute DOE's determination that the AT&T model number 2096 with chassis and model number 2048 with chassis satisfy the solicitation requirements. Therefore, the bid properly was found responsive. See, e.g., Applied Electro Mechanics, Inc., B-214673, Sept. 10, 1984, 84-2 C.P.D. ¶ 271.

Spectrum also objects to award on the basis of lease with option to purchase rather than on the basis of purchase because the awardee's purchase price is less than its lease price. Further, Spectrum alleges that Terminal's price for the lease of the equipment and for maintenance which would be necessary if the purchase option were exercised is unreasonably high.

Initially, DOE reports that the lease with option to purchase method will best satisfy the agency's needs. DOE points out that another contract for modems has been awarded which, when it becomes effective, will permit DOE to terminate the lease. Under these circumstances, DOE found the lease with option to purchase method provides the most cost effective approach to meeting its needs. In this regard, DOE also points out that the solicitation advised bidders that it reserved the right to make award "based upon the method of acquisition which represents the lowest overall system/item life cost, price and other factors considered."

The record shows that DOE conducted a comprehensive analysis to determine which acquisition method would best meet its needs. The purchase option is only more cost effective if the lease remains in effect for 17.5 months. DOE expects to have the items under lease replaced by the contractor that received the other contract award before 17.5 months have passed. Therefore, it appears DOE made the proper award selection. Furthermore, as discussed above, since DOE properly found Spectrum's bid nonresponsive and ineligible for award, the firm is not prejudiced by the agency's acquisition method choice. See, e.g., Eclipse Systems, Inc., B-216002, Mar. 4, 1985, 85-1 C.P.D. ¶ 267; Superior Boiler Works, Inc.; Conservco, Inc., B-215836, B-215836.3, Dec. 6, 1984, 84-2 C.P.D. ¶ 633.

Concerning Spectrum's protest that Terminal's price is unreasonable, a determination concerning price unreasonableness is a matter of administrative discretion which we will not question unless the determination is unreasonable or there is a showing of fraud or bad faith. A.O. Stilwell Co., Inc., B-216804, Apr. 30, 1985, 85-1 C.P.D. ¶ 486; Penn Microwave Devices, B-215497, Dec. 13, 1984, 84-2 C.P.D. ¶ 662.

Here, DOE determined price reasonableness by comparing Spectrum's and Terminal's prices. While Terminal's price based upon the minimum quantity of modems estimated in the solicitation is about 20 percent higher than Spectrum's price, DOE determined Terminal's price to be reasonable.

The protester has the burden of showing that the agency's price determination is unreasonable. Penn Microwave Devices, B-215497, supra. Spectrum, in arguing that Terminal's price is unreasonable, relies on a comparison of Terminal's individual line item prices with its own line item prices for selected certain items. However, DOE, consistent with the terms of the solicitation, evaluated total cost to the government based upon the minimum and maximum quantities indicated in the solicitation. See Square Deal Trucking Co., Inc., B-183695, Oct. 2, 1975, 75-2 C.P.D. ¶ 206. Further, while Terminal's price based upon the minimum quantity of modems is about 20 percent higher than Spectrum's price, the mere fact of award to a bidder whose price is higher than that offered by a bidder whose bid properly was rejected as nonresponsive does not establish that the contracting officer acted unreasonably in accepting the higher price. See Penn Microwave Devices, B-215497, supra. (awardee's price 30 percent higher than nonresponsive bidder). On the basis of the record before us, we cannot conclude that the contracting officer made award at an unreasonable price.

Finally, Spectrum alleges that Terminal failed to comply with the solicitation instruction that bidders enter a total price in the bidding schedule of their bids for the line items listed. DOE points out that Terminal entered a bid price for every line item on the bid schedule and entered a total price for these items in another section of its bid. Therefore, DOE waived the firm's failure to enter a total price in the schedule as a minor informality.

We find the absence of total prices was inconsequential, since the bid provided sufficient information to determine the totals by simple arithmetic. In any event, the totals were provided in another section of the bid. Thus, Terminal's failure to enter a total price in a particular section of its bid properly was waived by DOE. Triple A Shipyards, B-220282, Sept. 27, 1985, 85-2 C.P.D. ¶ 352.

The protest is denied in part and dismissed in part.

for *Seymour E. Gross*
Harry R. Van Cleve
General Counsel